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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE S. McCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 3, 1958.

OPINIONS BELOW

The trial court did not write an opinion. The opinion of the Court of Appeals for the Fifth Circuit has not been reported in the Federal Reporter.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on January 3, 1958. (R. 190). Motion for rehearing was denied on February 8, 1958. (R. 195). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petitioner is a practicing physician. He was indicted, tried and convicted of dispensing toxic drugs in violation of the Pure Food and Drug Act. The question presented by this case is whether or not the Act, 21 U.S.C.A. 353(b)(1), makes it unlawful for a licensed physician to dispense prescription drugs directly to a person without giving that person a prescription.

STATUTES INVOLVED

21 U.S.C.A. 353(b)(1) provides:

"(b)(1) A drug intended for use by man which—

(A) Is a habit forming drug to which Section 352(d) of this title applies; or

(B) Because of its toxity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drugs; or

(C) Is limited by the effective application under Section 355 of this title to use under the professional supervision of a

practitioner licensed by law to administer such drug,

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription, if such refilling is authorized by the prescriber, either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

It was charged that dispensing without a prescription violated 21 U.S.C.A. 331(k), which provides:

"The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce, and results in such article being adulterated or misbranded."

A penalty for violating the Act is provided for in 21 U.S.C.A. 333(a).

STATEMENT

T. G. Brown commenced the practice of medicine in Dumas, Texas, in 1929 and has been practicing there ever since. He maintains his office in the examining room of his hospital. He is about 65 years old. Be-

ginning in 1940, Dr. Brown commenced taking amphetamine tablets for weight control and as a stimulant to his nervous system. He still takes them. They should be taken under a physician's supervision. "Amphetamine" is the active ingredient in drugs sold under the patented names "dexedrine," "benzedrine," "dexamyl," "desoxyn," etc., which are prescribed by physicians for reducing, alcoholism, narcolepsy, mental depression and vegetativeness in older persons. Laymen know them as pills which appease the appetite and keep a person awake.

In the spring of 1956 an F.D.A. inspector, posing as a truck driver, called on Dr. Brown at his office for the purpose of obtaining a prescription for amphetamine tablets. He testified the doctor gave him a prescription upon request, later gave him another prescription, and later sold tablets to him twice in bottles containing 1,000 each. On the last trip he was accompanied by another inspector also posing as a truck driver, who testified the doctor sold him a bottle containing 1,000 tablets. Both witnesses testified the doctor did not give them a physical examination or written or oral prescription before delivering the bottles. Dr. Brown admitted giving the prescriptions, but denied sale of the three bottles. Dr. Brown was indicted for selling the three bottles to the agents. (R.10).

Asserting that the Pure Food and Drug Act provides no limitation on a licensed physician's prescribing, dispensing or administering a drug such as am-

phetamine, petitioner moved unsuccessfully to dismiss the indictment (R. 13), for judgment of acquittal which was re-urged (R. 16), objected to the Court's charge (R. 175), and was convicted (R. 23). Pursuant to Rule 39(b)(1) of the Rules of Criminal Procedure, an agreed statement was filed (R. 2). On appeal, the Court of Appeals affirmed. (R. 183).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court below has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court. The decision below should be reviewed because the Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Finally, the decision should be reviewed because the Court of Appeals has decided a Federal question in a way in conflict with decisions of the Supreme Court.

1. The decision below should be reviewed because the question presented is one of great importance and has not been settled by this Court. The Food and Drug Administration insists that the Act of October 26, 1951, amending the Pure Food and Drug Act must be interpreted in its broadest sense, and, doing so, that each time a physician administers or otherwise dispenses a drug he commits a misdemeanor if he does not write a written prescription to the patient. The Government stated in its brief in the Court of Appeals:

> " . . . We take the position, however, that even when the amount of drug dispensed by a physician is small, and it is dispensed in the course of a **bona fide** medical practice, this amounts to a minor violation of the Act unless a written record is made of the transaction . . ." (Page 15)

The Government and the F.D.A. must, to support their interpretation, disregard the history of the Pure Food and Drug Act, the reason for its amendment and must attribute to the word "prescription" a meaning it neither has in ordinary usage nor was intended by Congress. Prior to its amendment in 1951 the act regulated pharmacists only. Section 353(b) provided in part:

> "A drug dispensed on a written prescription signed by a physician, dentist or veterinarian . . . shall if—
>
> (1) Such physician, dentist or veterinarian is licensed by law to administer such drug and
>
> (2) Such drug bears a label containing the name and place of business of the dispenser, the serial number and date of such prescription, and the name of such physician, dentist or veterinarian,
>
> be exempt from the requirements . . ."

The Section dealt only with those drugs "dispensed on a written prescription signed by a physician . . . licensed to practice" and did not regulate physicians or drugs administered by them. In its original form the Act was not satisfactory to the F.D.A. or others affected by it, and amendments were proposed. The House Committee on Interstate and Foreign Com-

merce submitted its report No. 700 on July 16, 1951, and it reveals only a desire to clearly distinguish "prescription drugs" and to relieve druggists from unnecessary restrictions. Even the Attorney General so construed the Act, for the Committee considered the letter of Peyton Ford, Deputy Attorney General, dated April 30, 1951, in which he stated:

> "This would insert into the Federal Food, Drug and Cosmetic Act the theory, based on regulations, pursuant to which the Food and Drug Administration has recommended prosecution of druggists who sell, without prescriptions, drugs bearing the so-called prescription legend and which have not been removed from the immediate containers in which they were shipped in interstate commerce. Such a sale by a druggist would be in violation of Section 3331(k)."

The proposed amendment was also considered by the Senate Committee on Labor and Public Welfare, which submitted its report No. 946 on October 12, 1951, and that report reveals a desire to regulate druggists only, and no mention is made of attempting to regulate licensed physicians. The legislative history appearing in U. S. Congressional and Administrative Service, 82nd Congress, First Session, begins at page 2454. Nowhere is there an indication of the desire to regulate physicians; instead:

> "All drugs covered by the three classifications of prescription drugs must bear a label containing the statement 'Federal Law Prohibits Dispensing Without Prescription.'
>
> This gives the retail druggist clear notice that he will be in violation of the Federal Food, Drug

and Cosmetic Act if he dispenses any drugs so labeled without a prescription."

"This bill also specifies what information must be contained upon the label of the package dispensed to the patient. That label must contain the name and address of the dispenser, the serial number and date of the prescription or of its filing, the name of the prescriber, and, if stated in the prescription, the name of the patient and the directions for use and cautionary statements, if any, contained in the prescription."

"Also, as pointed out elsewhere, with respect to other habit forming drugs, oral prescriptions and refills are limited to situations in which the pharmacist obtains satisfactory evidence, on the basis of consultation with a licensed practitioner or otherwise, that the prescription or refill has been expressly authorized by such practitioner. A violation of the prescription requirements of paragraph (1) of the new subsection (b) is, under the provisions of this paragraph, deemed to be an act which results in the drugs being misbranded while held for sale."

The legislative history indicates that the Committee and Congress had in mind only the regulation of retail pharmacists and were concerned with relieving the confusion as to what drugs those pharmacists could dispense without a prescription and what drugs they could dispense only upon receiving a physician's prescription.

In Webster's First International Dictionary, the term "prescription" is defined:

"2. **Med.**, a written direction for the preparation

> and use of a medicine; a medical recipe; also, a prescribed remedy."

In Webster's Second International Dictionary, it is defined as:

> "A doctor's written direction for the preparation and use of a medicine."

The Government and Court below do not attribute the recognized meaning to that word. Instead, they read into the statute a provision like that expressly included by Congress in the Harrison Anti-Narcotic Act. The Harrison Act excepts:

> "(b)(1) * * * registered practitioners who give prescriptions for legitimate uses * * *."
>
> "(b)(2) * * * in the course of his professional practice and where such drugs are dispensed or administered to the patient for legitimate medical purposes." 26 U.S.C.A. 2553.

The importance of this provision is self-evident, but the Court below disregarded it. The importance of the statutory requirement that the prescription be

"in the course of his professional practice only"

has been noted by this Court on two occasions. In **Webb v. United States,** 249 U.S. 96 and **Jin Fuey Moy v. United States,** 254 U.S. 189, violations of the Harrison Anti-Narcotic Act were involved. In the Webb case, morphine was administered for the sole purpose of keeping the addict comfortable by maintaining his customary use. This Court held that the physician's order directing the dispensing of morphine to the

addict was not a prescription in the course of his professional practice only. In the Jin Fuey Moy case, the prescription was given to a person not the physician's patient, and this Court stated:

> "Manifestly, the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug." (Page 194)

If the provision of Section 353(b)(1) is to be applied to regulate physicians in the conduct of their treatment when Congress did not intend that result, and if a vital provision "in the course of his professional practice only" is to be read into the Section, certainly it should be done by this Court.

2. The petition should be granted because the Court of Appeals has rendered a decision in conflict with another Court of Appeals on the same matter. In **Archambaut v. United States,** 224 Fed 2d 925, the Tenth Circuit sustained the conviction of the defendant who had given an F.D.A. agent nembutol capsules on the sole ground that while the defendant thought himself a competent doctor, he was not. In fact he

was not a licensed physician, but a charlatan. In addition, the Seventh Circuit, in **United States v. 2600 State Stores,** 235 Fed 2d 913, considered the complaint of a druggist convicted under the Section for making a sale without a prescription. The Court held:

> "Another factor which we must consider in the instant case is the fact that the provisions of the Sections of the Act hereunder consideration were to bind **pharmacists** and to subject them to penalties in case of violations."

In the only reported District Court case, **United States v. 10 Cartons,** 152 Fed Supl 360, the Court stated that licensed practitioners were exempt from the Act in these words:

> "Footnote (6). When Congress intended to exempt licensed practitioners from the operation of the Act it spoke plainly enough. See Section 503(b)(2), 21 U.S.C.A., Section 353(b)(2)."

On the other hand, Justice Whittaker, while a District Judge, held the Act did not exempt licensed practitioners. No opinion was written in that case, but a transcript of the Court's sentencing remarks on a plea of nolo contendere was filed in the Court below.

3. The petition should be granted because the Court of Appeals has decided a Federal question in a way in conflict with decisions of the Supreme Court. Prior to its amendment in 1951, the Pure Food and Drug

Act did not regulate physicians' prescriptions. Following Justice McReynolds' statement

> "Obviously direct control of medical practice in the States is beyond the power of the Federal Government."

in **Linder v. United States,** 69 Lawyer's Ed. 819, the Ninth Circuit, in **Schlessing v. United States,** 239 Fed 2d 885, stated:

> "The practice of medicine is * * * regulated by the legislature and administrative boards of the State * * * it is a mooted question whether a chiropractor can use such a device, but it is one for the courts and agencies of California to regulate. The agency (F.D.A.) has no jurisdiction or authority to attempt to regulate the practice of medicine * * *."

Nothing in the 1951 amendment adds to the provisions to make the Act applicable to physicians, and the enlargement insisted upon by the Government and made by the Court below is judicial only. This Court stated in **Pierre v. United States,** 314 U.S. 306, 86 Law. Ed. 226:

> "A comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

Section 353(b)(1) recognizes his right to give a prescription and apparently exempts a physician from

compliance with the Pure Food and Drug Act as did the predecessor to that Section. This Court, in considering the inspection requirement of the Pure Food and Drug Act, stated in **United States v. Cardiff,** 340 U.S. 174, 97 Law .Ed. 200, 73 Supreme Court 189:

> "However we read Section 301(f), we think it is not fair warning to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited • • • We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold."

In **United States v. 2600 State Stores,** 235 Fed 2d 913, the Seventh Circuit considered the complaint of a druggist convicted under Section 353(b)(1) for making a sale without a prescription. The druggist asserted that the statute was so vague, uncertain, and indefinite in defining his conduct as a crime as to fall short of the due process requirement. That contention was rejected as to the pharmacist but solely on the ground that the amendment was adopted for the purpose of regulating pharmacists, and we submit that the Court of Appeals' decision below extending the amendment to physicians is repugnant to the due process clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE S. MCCARTHY,

Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.,
1016 Fisk Building,
Amarillo, Texas,
Of Counsel.

APPENDIX

(January 3, 1958.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from the conviction of a physician for the violation of provisions of the Food, Drug and Cosmetic Act that prohibits the **dispensing** of certain potentially harmful drugs, transported in interstate commerce, without a **prescription.**

The evidence fully warranted the jury's finding that the appellant, a practicing physician in Dumas, Texas, sold to two Federal agents, whom he supposed to be truck drivers, three separate lots of dextro-amphetamine hydrochlorine tablets[1] that had been shipped in interstate commerce; that prior to dispensing them Dr. Brown had not prepared or given them any prescription and had not physically examined either of them and had not questioned them or "prescribed" a dosage or otherwise attempted to acquaint himself with either the physical condition or needs of either man.

The statute under which the three-count indictment was brought makes illegal and punishable as for a misdemeanor, under circumstances here present, a

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[1] The testimony, denied by the accused, was to the effect that the agent Spivak obtained 1000 5-mg. tablets on March 10th, 1000 10-mg. tablets on March 22nd, and that, in the presence of Spivak, another agent, Keeting, received 1000 5-mg. tablets on March 23rd.

violation of the following provisions of 21 U.S.C.A. §353(b)(1):

> "A drug intended for use by man which . . .
>
> (B) Because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such a drug;
>
> . . . .
>
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."
>
> 21 U.S.C.A. §353(b)(2).

Although the appellant denies the sales, implying that the transactions with the two agents were of quite a different nature, he makes no contention that there was not sufficient evidence to sustain the conviction if the terms of this statute reach a regularly licensed physician who sells these covered drugs under the circumstances outlined. The burden of his defense is that the provisions of the Act do not apply to the act of dispensing drugs by a licensed physician.

No decided case in which an appellate court has

precisely held this law applicable to the conduct of a regularly licensed physician has been called to our attention. The Court of Appeals for the Tenth Circuit affirmed a conviction of one who held himself out to be a doctor, but who had not obtained a medical license in **Archambaut v. United States**, 10 Cir., 224 F. 2d 925. The District Court for the Western District of Missouri construed the law as here contended for by the United States where it entered a judgment of conviction on a plea of nolo contendere against a doctor who dispensed pills of the prescribed type without an examination or prescription. In sentencing the prisoner, the district judge, now Supreme Court Justice Whittaker, said:

> "Your error lies in the fact that, having a license to practice medicine, you have assumed that it was a license to peddle pills, and that is not the law. People came to you, Doctor, and without an examination or any prescription, just ordered pills and you would ask them, 'Do you want the red or the yellow?'—and you just handed out the pills, these barbiturates and sex harmones, without any examination or prescription. You did that to those Government agents who came in there, not once but half a dozen times.
>
> "Now, there seems to be some concept among the members of the medical profession that to have a license to deal in medicine carries a license to deal in barbiturates. That is not the law. The medical profession might just as well understand it. If I come to you for treatment and you, in your medical capacity examine me, and after examination determine that certain barbiturates would be beneficial to me, then you have a right

> to write a prescription to me, and then I have a right to get them and use them, but not otherwise."
> **United States v. Amin Boutros,** (D.C.W.D. Mo.) No. 19,304-Cr. Decided Dec. 23, 1955.

The language of the statute, considered alone, is certainly broad enough to make criminal what was done here. It says expressly that these pills "shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such . . . . ." The 3000 tablets were acquired by the "purchasers," who were not "patients," without either a written or oral prescription, no matter how broadly the word "prescription" is to be construed.

Appellant argues only that although the language is broad enough to include physicians, the statute must be interpreted differently and for this proposition he refers to the discussion in the legislative history of the apparent purpose to make the requirements applicable to "druggists." But we do not need to refer to the legislative history of this particular act to construe the statute. The Supreme Court has on several occasions held that the purpose of the legislation is the protection of the people from dangerous products which are shipped in interstate commerce. **United States v. Dotterweich,** 320 U.S. 277; **United States v. Sullivan,** 332 U.S. 689. Further the Court, in the Sullivan case, said:

> " . . . there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it." 332 U.S. 689, 693.

Moreover, the Supreme Court has also construed the word "prescription" as used in other related Federal legislation. Recognizing, as we do, that under the Harrison Narcotic Act, the question of good faith treatment of patients may be involved, nevertheless we find, in a Harrison Act case, pertinent language describing a "prescription." The Court answered a certified question from the Court of Appeals for the Sixth Circuit:

> "3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of '2?"
>
> **Webb v. United States,** 249 U.S. 96, 99.

The answer, obvious it seems to any who consider the matter, was:

> "As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."
>
> **Webb v. United States,** 249 U.S. 96, 100.

What was there said by the Supreme Court an-

swers, we think, appellant's objection to the court's charge that the jury might properly consider whether a doctor-patient relationship existed.[2] The inquiry whether there was a bona fide relationship of patient and doctor bears on the question whether there had ever been a "prescription" for the agents. The court thus broadened the term to something more than written paper, which really benefitted the accused. The jury, under this charge, could have found that Dr. Brown "prescribed" for the men if the jury had found the existence of a doctor-patient relationship which appellant testified vaguely did exist, at least as to two of the sales. There was no error in submitting this issue to the jury.

We conclude that the jury had ample grounds for finding that Dr. Brown dispensed the tablets without prescription and we find that such action is prohibited under the law, even when done by a regularly licensed physician.

The judgment is AFFIRMED.

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2 The charge was:

"If you find that the defendant did dispense the original contents of Government Exhibits 1, 2 and 3, two of them to the Government witness Spivak, and the other to the Government witness Keeting, then in determining whether he dispensed the drugs thereon on prescription, you may properly consider whether a doctor-patient relationship existed between the defendant and the person to whom you find he sold the bottle of drug in each instance, whether he considered the individual needs of the person to whom he dispensed the drug, the quantity of the drug dispensed and the manner in which he supervised the use of the drug. The fact that the defendant is a physician licensed under the laws of Texas does not exempt him from responsibility for any violation of the terms of the Federal law in question."

ORDER DENYING REHEARING

Extract from the Minutes of February 8, 1958

THOMAS GUY BROWN,

No. 16,536 *v.*

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.